

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
ORDER WQO 2004-

In the Matter of the Petition of

**ENVIRONMENTAL PROTECTION INFORMATION CENTER
AND HUMBOLDT WATERSHED COUNCIL**

For Review of Order Nos. R1-2002-0109 and R1-2003-0116
Adopting Interim Categorical Waivers
for Discharges Related to Timber Harvesting
Issued by the
California Regional Water Quality Control Board,
North Coast Region

SWRCB/OCC FILE A-1539

BY THE BOARD:

I. INTRODUCTION

On December 10, 2002, the North Coast Regional Water Quality Control Board (Regional Board) adopted Order No. R1-2002-0109, which established a new one-year interim categorical waiver of waste discharge requirements for discharges resulting from timber harvesting activities under specified conditions. On January 9, 2003, the Environmental Protection Information Center and the Humboldt Watershed Council (Petitioners) filed a petition with the State Water Resources Control Board (State Board) asking for review of the Regional Board order adopting the waiver.¹

On August 13 and 14, 2003, the State Board held a consolidated evidentiary hearing on the petition filed in this matter and on similar petitions that requested review of waivers for timber harvesting adopted by the regional water quality control boards (regional boards) for the

¹ Although the State Board's letter acknowledging receipt of the petition referred to the petition as having been filed on January 10, 2003, a facsimile of the petition was filed on January 9, 2003, within the 30-day period for seeking review authorized by Water Code section 13320. In addition to the matters addressed in this order, the petition asked for a stay of the Regional Board order adopting the waiver pending the State Board's review of the petition on the merits. By letter dated April 24, 2003, the State Board advised Petitioners that the request for a stay was denied.

Central Valley and Lahontan Regions.² Following the hearing, participants in the consolidated proceeding submitted legal briefs.

On November 5, 2003, the Regional Board adopted Order No. R1-2003-0116, which is very similar to Order No. R1-2002-0109 and which extends the categorical waiver for timber operations until December 31, 2004. On November 17, 2003, Petitioners submitted a supplemental petition requesting that the State Board review Order No. R1-2003-0116 as part of the consolidated review of the timber harvesting waivers addressed in the State Board's ongoing proceeding. At a public workshop on January 6, 2004, the State Board discussed a proposed order regarding the interim waiver for timber harvesting adopted by the Regional Board.³ On January 14, 2004, the State Board notified interested parties that, on its own motion, the State Board would review Order No. R1-2003-0116 as part of the ongoing proceeding to review the previous waiver adopted by Order No. R1-2002-0109. (Cal. Code Regs., tit. 23, § 2050.5(c).) The notice stated that the Regional Board and other interested parties may file written comments regarding issues related to Order No. R1-2003-0116 by 5 p.m. on February 13, 2004.⁴ In response to a request for additional time to comment submitted by counsel for the California Forestry Association (CFA), the time for filing written comments on Order No. R1-2003-0116 was extended to 5 p.m. on February 20, 2004. Following receipt of those comments, the State Board discussed possible revisions to the draft order at public meetings on March 18 and April 22, 2004.

Based on our review of the record, the State Board concludes that, in adopting the interim categorical waivers for timber harvesting activities on nonfederal land in the North Coast Region, the Regional Board did not comply with the California Environmental Quality Act (CEQA). (Pub. Resources Code, §§ 21000 et seq.) This order also concludes that the provisions

² The issues raised in the petitions requesting review of the waivers adopted by each regional water quality control board vary depending upon the waiver in question and the party filing the petition(s). Although the hearing on the three petitions was consolidated for purposes of convenience and efficiency, the State Board's review of issues regarding each waiver is limited to those issues raised in the petition(s) filed with respect to the waiver in question.

³ The proposed order was distributed to interested parties on December 5, 2003. The proposed order stated that the State Board would take official notice of Order No. R1-2003-0116.

⁴ The notice also advised the parties that the State Board's record for review of Order No. R1-2003-0116 will include the Regional Board's administrative record for adoption of that order together with the administrative record compiled for review of the interim waiver previously adopted in Order No. R1-2002-0109. Therefore, parties were advised that any comments filed in response to the January 14, 2004, notice should be limited to issues that are unique to Order No. R1-2003-0116.

of the waiver applicable to timber harvesting on nonfederal land require satisfaction of conditions that do not now exist and which are not under control of the Regional Board or dischargers who may be subject to the waiver. Based on the record in this proceeding, adopting a waiver for timber harvesting activities that is dependent upon compliance with those conditions would be contrary to the public interest.

The one-year waiver adopted by Order No. R1-2002-0109 is no longer in effect and has been replaced by the similar waiver adopted in Order No. R1-2003-0116. On March 24, 2004, the Regional Board adopted Order No. R1-2004-0015. That order adopted a new conditional waiver of waste discharge requirements for discharges related to timber activities on federal lands managed by the United States Forest Service (USFS) and rescinded the provisions of Order No. R1-2003-0116 that applied to those projects. Order No. R1-2004-0015 is not at issue in this proceeding and, therefore, this order takes no action with respect to timber harvesting on federal lands managed by the USFS. However, the provisions of the waiver adopted in Order No. R1-2003-0116 remain in effect with respect to some types of timber activities on nonfederal land. Due to the deficiencies in ~~the current waiver~~ Order No. R1-2003-0116 and the process by which it was adopted, this order remands Order No. R1-2003-0116 to the Regional Board for reconsideration and further action within 90 days. This order also directs that any future actions by the Regional Board to adopt a categorical waiver for discharges related to timber harvesting shall be consistent with the findings and conclusions of this order.

II. BACKGROUND

A. Regulation of Timber Harvesting by the California Department of Forestry and Fire Protection, and the Board of Forestry, ~~and the United States Forest Service~~

Timber harvesting activities on nonfederal lands in California are regulated primarily by the California Department of Forestry and Fire Protection (CDF) and the Board of Forestry (BOF). CDF and BOF regulate timber operations pursuant to the Z'berg-Nejedly Forest Practice Act (Forest Practice Act),⁵ the California Forest Practice Rules (Forest Practice Rules),⁶ and CEQA.⁷ CDF utilizes an interagency review team process for the evaluation of timber

⁵ Pub. Resources Code, §§ 4511 et seq.

⁶ Cal. Code Regs., tit. 14, §§ 895 et seq.

⁷ Pub. Resources Code, §§ 21000 et seq.

harvesting plans (THPs) submitted for proposed timber operations on nonfederal lands. The THP review process has been certified as functionally equivalent to the CEQA process governing preparation of negative declarations and environmental impact reports. (Cal. Code Regs., tit. 14, § 15251(a).)

In 1988, the State Board conditionally certified the “Water Quality Management Plan for Timber Operation on Nonfederal Lands” which included those Forest Practice Rules selected as “best management practices” and the process by which those rules are administered. In 1988, the State Board also designated CDF and BOF as joint Water Quality Management Agencies (WQMA) and executed a Management Agency Agreement with CDF and BOF for the purpose of implementing the certified plan. The Management Agency Agreement with CDF and BOF required a formal review of the Forest Practice Rules and administering process no later than six years from the date of certification. To date, that review has not occurred. The United States Environmental Protection Agency (USEPA) has not approved the State Board’s 1988 conditional certification of the Forest Practice Rules and related administrative processes for regulation of timber harvest activities on nonfederal lands in California.

~~Timber harvesting activities on National Forest lands in California are regulated primarily by the United States Forest Service (USFS). In 1981, the State Board designated the USFS as the WQMA for timber harvest activities on National Forest lands pursuant to section 208 of the Clean Water Act. USFS implements certified “best management practices” and procedures for protection of water quality as identified in the document titled “Water Quality Management for National Forest System Lands in California” and the 1981 Management Agency Agreement between the State Board and USFS. The Management Agency Agreement contemplates that the regional boards will waive issuance of waste discharge requirements for USFS timber harvest activities that may result in nonpoint source discharges provided that the USFS designs and implements its projects to fully comply with state water quality standards. The environmental impacts of timber harvest activities on federal lands must be addressed and mitigated in accordance with the federal timber harvest planning process pursuant to the National Environmental Policy Act (NEPA). (42 U.S.C. §§ 4321 et seq.).~~

The regional boards regulate possible water quality impacts of timber harvest activities by participating in the CDF ~~and USFS~~ timber harvesting review processes and through

exercising the independent authority provided by the Porter-Cologne Water Quality Control Act. (Wat. Code, §§ 13000 et seq.)⁸

B. Statutory Provisions Regarding Waivers of Waste Discharge Requirements Adopted by the Regional Water Quality Control Boards

The record includes extensive evidence that timber harvesting and related activities can result in the discharge of sediment and other waste material into nearby streams and rivers. Water Code section 13263 provides that regional boards shall prescribe requirements regulating waste discharges, which implement the provisions of applicable water quality control plans.

Since 1969, Water Code section 13269 has authorized regional boards to waive reports of waste discharge and issuance of waste discharge requirements for specific discharges or types of discharges if the waiver is not against the public interest. Waivers of waste discharge requirements for types of discharges are called categorical waivers. Section 13269 provides that waivers must not be against the public interest, that all waivers are conditional, and that waivers may be terminated at any time by the State Board or a regional board. Subdivision (e) of section 13269 provides that the regional boards and the State Board “shall require compliance with the conditions pursuant to which waivers are granted under this section.” Water Code section 13350 authorizes the State Board, regional boards, or a court to impose civil liability upon anyone who discharges waste or causes waste to be deposited where it is discharged into waters of the State.⁹

In 1999, Water Code section 13269 was amended to provide that all waivers in effect on January 1, 2000, would expire on January 1, 2003, unless renewed. Section 13269 further provides that categorical waivers may not exceed five years, but may be renewed in five-year increments. Subdivision (f) of section 13269 requires that, prior to renewing a categorical waiver, a regional board must determine whether the type of discharge covered by the waiver

⁸ In addition to the regional boards’ authority under the Porter-Cologne Water Quality Control Act, beginning January 1, 2004, the regional boards also have authority to prevent approval of timber harvesting plans on nonfederal land if: (1) the proposed timber operations will result in a discharge into a watercourse that has been classified as impaired due to sediment pursuant to section 303(d) of the Clean Water Act; and (2) the discharge will cause or contribute to a violation of the Basin Plan. (Pub. Resources Code, § 4582.71, subd. (a), as added by Senate Bill 810, Stats. 2003, ch. 990, § 3.)

⁹ Water Code section 13350 previously authorized assessment of civil liability on those who intentionally or negligently discharge waste or cause waste to be discharged into the waters of the state. The Legislature recently amended section 13350 to delete the requirement that a discharge be intentional or negligent in order for civil liability to be imposed. (Assembly Bill 897, Stats. 2003, ch. 683, § 4.)

should be regulated under general or individual waste discharge requirements. In 2003, section 13269 was further amended to expressly provide that waivers must be consistent with any applicable water quality control plan and must include monitoring provisions. The amendment also authorized the State Board to adopt annual fees to be paid by recipients of waivers.¹⁰

C. Interim Categorical Waivers of Waste Discharge Requirements for Timber Harvesting Adopted by North Coast Regional Water Quality Control Board

Following a public hearing on December 10, 2002, the Regional Board adopted Order No. R1-2002-0109 and approved a Negative Declaration pursuant to the applicable provisions of the CEQA Guidelines. (Cal. Code Regs., tit. 14, § 15000 et seq.) The Negative Declaration concludes that the waiver of waste discharge requirements for timber operations adopted pursuant to Order No. R1-2002-0109 would not have a significant impact on the environment. The order waives issuance of waste discharge requirements on both nonfederal and federal lands subject to certain general requirements until December 31, 2003.

With respect to nonfederal land, Order No. R1-2003-0109 waives issuance of waste discharge requirements and submittal of reports of waste discharge for timber operations, except for those activities for which waste discharge requirements are adopted under specified criteria, provided that the following conditions are met as summarized below:

1. The State Board continues to certify the existing “Water Quality Management Plan for Timber Operations on Nonfederal Lands in California” as “Best Management Practices” and continues the designation of the BOF and CDF as the joint management agencies for implementation of that plan;
2. BOF and CDF proceed to adopt and implement: (a) a water quality regulatory program consistent with the basin water quality control plan; (b) a “timber harvest verification system” (including but not limited to inspection, surveillance, monitoring, and enforcement) that is acceptable to the Regional Board; and (c) a regulatory process sufficient to maintain any applicable water quality control plan standards and “Total Maximum Daily Load Prescriptions” as adopted from time to time by the Regional Board and approved by the State Board;

¹⁰ Wat. Code, § 13269, subd. (a)(4)(A), as amended by Senate Bill 923, Stats. 2003, ch. 801.

3. Timber operations must at all times comply with the requirements of the Basin Plan,¹¹ including water quality objectives, prohibitions, Total Maximum Daily Load (TMDL) implementation plans, narrative, or other requirements contained in a water quality control plan;

4. The discharger shall comply with any monitoring program when required to do so by the Regional Board Executive Officer pursuant to Water Code section 13267; and

5. Prior to commencement of timber operations, the discharger shall file a written Notice of Intent with the Regional Board, with a copy of an approved Timber Harvest Plan attached, in which the discharger certifies that they understand and intend to comply with all water quality regulations and the provisions of the waiver.

The order provides that the waiver does not apply if the Regional Board Executive Officer determines that timber operations on nonfederal land meet any of the following criteria: (1) the timber operations have varied from the approved THP or other project document in a way that could adversely affect water quality; (2) the Executive Officer agrees with a request to issue waste discharge requirements received from a California State Agency or subdivision thereof; (3) cumulative impacts, special hydrographic characteristics or TMDL standards warrant further regulation¹²; (4) the timber operations involve a discharge that could result in less water quality protection than required in water quality control plans approved pursuant to Water Code section 13245; or (5) timber operations not complying with applicable conditions of the Regional Board order adopting the waiver.

~~Order No R1-2002-0109 also includes several criteria defining the conditions under which the waiver applies to timber harvesting on federal lands managed by the USFS. The waiver specifies that, as a condition of applicability of the waiver to timber harvesting on federal lands managed by the USFS, the USFS must maintain: (a) a water quality program consistent with the Basin Plan; and (b) a verification system that includes inspection, surveillance, enforcement, and monitoring of best management practices and TMDL prescriptions as adopted by the Regional Board and approved by the State Board. In contrast to the similar provision applicable to nonfederal land which calls upon CDF and BOF to “proceed to adopt and~~

¹¹ References to the “Basin Plan” in this order refer to the Water Quality Control Plan for the North Coast Region.

¹² Section 303(d) of the federal Clean Water Act requires the states to identify waters that are not meeting established water quality standards after technology-based discharge limits on point sources of pollution have been implemented. States are then required to identify the TMDL of specified pollutants that will allow for meeting applicable water quality standards and to develop a plan for meeting those standards.

~~implement” a water quality regulatory program, the condition that applies to land managed by USFS simply provides that USFS must “maintain” such a program. The waiver also includes several other conditions intended to ensure that timber harvesting on federal land is conducted in accordance with applicable water quality regulations.~~

The final provision of Order No. R1-2002-0109 approved the Negative Declaration that was prepared for the waiver pursuant to provisions of CEQA. A copy of the Negative Declaration and the initial study on which the Regional Board’s finding of no significant impact was attached as Exhibit A to the petition.

The interim categorical waiver established by Order No. R1-2002-0109 expired on December 31, 2003. On November 5, 2003, the Regional Board adopted a second order that: (1) is very similar to Order No. R1-2002-0109; and (2) extended the categorical waiver for timber operations until December 31, 2004. (Order No. R1-2003-0116.)¹³ The Regional Board stated that the extension of the waiver for an additional year does not represent a substantial modification of the previously approved waiver and concluded that no additional environmental documentation was required under CEQA. (Order No. R1-2003-0116, pp. 3 and 4, paragraph 25.) Unless otherwise noted, references in this order to the waiver adopted by the Regional Board refer to the waiver as adopted in Order No. R1-2002-0109 and to the similar waiver that was adopted in Order No. R1-2003-0116.

¹³ On November 17, 2003, Petitioners submitted a supplemental petition asking that the State Board review the Order No. R1-2003-0116 as part of its consolidated review of timber harvesting waivers in response to Petitions A-1539, A-1546, A-1552, and A-1552(a). By letter dated December 8, 2003, the State Board advised Petitioners and the Regional Board that the State Board would consolidate its review of the waiver adopted in Order No. R1-2003-0116 with its review of the previous interim waiver adopted in Order No. R1-2002-0109. By letter dated January 14, 2004, interested parties were advised that the State Board would review Order No. R1-2003-0116 on its own motion and that they could submit comments on issues related to that order by February 13, 2004. The State Board subsequently extended the time for submission of comments until 5 p.m. on February 20, 2004. The State Board received comments from the Regional Board within the time specified. Shortly after 5 p.m. on February 20, 2004, the State Board also received extensive written comments from CFA, together with 14 attached “exhibits” including an unofficial written transcript of the November 5, 2003, Regional Board meeting, which was prepared by CFA and which appears to contain numerous errors. CFA requests that the State Board consider its additional exhibits as “rebuttal evidence” to a report that was submitted in the Regional Board proceedings prior to adoption of Order No. R1-2003-0116. CFA does not explain, however, why the additional evidence (other than the transcript) could not have been presented to the Regional Board. (Letter from attorney Wayne Whitlock to SWRCB Chair Arthur G. Baggett dated February 20, 2004, pp. 22 and 23, footnote 38.) CFA’s request to present additional evidence does not meet the applicable requirements under the regulations governing review of Regional Board actions. (Cal. Code Regs., tit. 23, § 2050.6(a)(2).)

D. Summary of Issues Raised By Petitioners

Petitioners allege that the Regional Board's adoption of the waiver was improper for three main reasons. First, Petitioners contend that the Regional Board has no authority to issue a waiver for discharges from man-made conveyances, including culverts, drainage ditches, and erosion channels and gullies that are the result of logging. Petitioners argue that those types of discharges must receive a National Pollution Discharge Elimination System (NPDES) permit pursuant to the provisions of the federal Clean Water Act. (33 U.S.C. §§ 1251 et seq.) Second, Petitioners contend that the Regional Board did not comply with CEQA in its adoption of the waiver and that the Regional Board was legally required to prepare an environmental impact report (EIR). Finally, Petitioners contend that the categorical waiver adopted by the Regional Board is contrary to the public interest and, therefore, in violation of Water Code section 13269. Petitioners' contentions are addressed below.

III. CONTENTIONS AND FINDINGS¹⁴**A. Applicability of National Pollution Discharge Elimination System Permitting System to Timber Operations**

Contention: Petitioners contend that the Regional Board orders unlawfully waive permits for point source discharges of pollutants. Petitioners argue that discharges from all man-made conveyances associated with logging are point source discharges of pollutants rather than natural run-off. Consequently, Petitioners contend that those discharges must be regulated under the NPDES permit system rather than through issuance of a waiver as was done by the Regional Board.

Findings: In addition to felling trees, timber harvesting often involves construction and maintenance of logging roads and watercourse crossings, and installation and maintenance of culverts and drainage ditches. The applicability of the NPDES permit system to discharges that occur as a result of silvicultural activities is addressed in 40 Code of Federal Regulations part 122.27. The regulation provides that silvicultural point sources include several types of specified facilities from which pollutants are discharged into waters of the United

¹⁴ This Order does not address all of the issues raised by the Petitioners and other interested parties. The State Board finds that, in the context of the present review of Order Nos. R1-2002-0109 and R1-2003-0116, the issues that are not addressed are insubstantial and not appropriate for State Board review. (See *People v. Barry* (1987) 194 Cal.App.3d 158 [239 Cal.Rptr. 349], Cal. Code Regs., tit. 23, § 2052.)

States. Silvicultural point sources are defined as including “any discernible confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States.” (40 C.F.R. § 122.27(b).) The regulation also identifies several other activities such as site preparation, reforestation, thinning, prescribed burning, and road construction and maintenance that are not considered to be point sources.

Petitioners cite *Wilderness Defenders v. Forsgren* (2002) 309 F.3d 1181 (9th Cir.) which held that the list of silvicultural point source activities in 40 Code of Federal Regulations part 122.27(b) is not exhaustive, that the NPDES regulations exclude only natural runoff, and that aerial spraying of pesticide in silvicultural operations was subject to regulation as a point source discharge of pollutants. (*Id.* at 309 F.3d, pp. 1186, 1188, and 1190.) However, *Forsgren* does not resolve the issue of whether ditches and culverts that channel natural run-off for a short distance within timber harvesting areas result in that run-off becoming subject to regulation as a point source discharge for which an NPDES permit is required.

The subject of regulation of discharges associated with timber operations is addressed in the recent Court of Appeal decision in *Environmental Defense Center v. United States Environmental Protection Agency* (2003) 344 F.3d 832 (9th Cir.). The decision discusses the obligation of the U.S. Environmental Protection Agency (USEPA) to regulate discharges from various sources, including forest roads, as part of the “Phase II” rule-making proceeding for discharges of stormwater pursuant to section 402(p) of the Clean Water Act. (33 U.S.C. § 1342(p).) The court remanded the rule-making proceeding to USEPA for several purposes, including directing USEPA to consider the plaintiffs’ contention that section 402(p)(6) requires USEPA to regulate discharges from forest roads. Prior to concluding that USEPA must consider regulating discharges from forest roads pursuant to the mandate of section 402(p) to regulate stormwater discharges, the court addressed the contentions of the parties regarding the effect of 40 Code of Federal Regulations part 122.27(b) on classification of discharges from forest roads as either point source or non-point source discharges. (*Supra*, 344 F.3d at pp. 861-862.) The discussion of those arguments in the decision reflects the court’s recognition that applicability of the NPDES permit system to discharges associated with forest roads remains an unresolved issue.

The State Board, the regional boards, and USEPA traditionally have not required NPDES permits for discharges associated with forest roads and other types of discharges associated with timber harvesting that are not listed as point sources in 40 Code of Federal Regulations part 122.27(b) or other applicable federal regulations. In the absence of legal authority establishing that such discharges should be regulated under the NPDES permit system, the State Board concludes that the regional boards may continue to issue waivers for discharges associated with timber harvesting subject to compliance with applicable requirements under Water Code section 13269. However, any waivers adopted for discharges associated with timber harvesting should include an express provision stating that the waiver does not apply to discharges that require an NPDES permit pursuant to the Clean Water Act.¹⁵ In the event future legal developments establish that an NPDES permit is required for certain types of discharges previously considered to be non-point source discharges, then the Regional Board can advise affected dischargers to apply for a permit at that time.

B. Compliance with CEQA

Contention: Petitioners contend that the Regional Board violated CEQA in several respects and that the Regional Board was legally required to prepare an EIR prior to adoption of the interim categorical waivers for timber harvesting.

Finding: Unless a proposed project is exempted by statute or regulation, CEQA requires that, if there is substantial evidence in light of the whole record that the project may have a significant effect on the environment, then the lead agency that proposes to carry out or approve the project must prepare an EIR.¹⁶ The EIR must identify potential environmental

¹⁵ Following submission of legal briefs, counsel for Petitioners advised the State Board by letter dated October 15, 2003, of an opinion issued by the U.S. District Court for the Northern District of California on October 14, 2003, in *Environmental Protection Information Center v. Pacific Lumber Company, et al.* (Civil Action No. C 01-2821.) The opinion concluded that ditches, culverts, channels and gullies that would be within the definition of “point source” under section 502(14) of the Clean Water Act cannot be removed from that classification by any provision or interpretation of Code of Federal Regulations, title 40, section 122.27(b). The court reaffirmed that holding in its order denying Pacific Lumber Company’s motion to dismiss entered on January 23, 2004. (2004 WL 180413; ___ F. Supp 2d __.) Petitioners argue that, since ditches, culverts and other discrete conveyances are employed as a matter of course by almost all logging operations, compliance with the Clean Water Act requires all logging operations to obtain NPDES permits. However, the case cited by Petitioners is not yet resolved and has no binding legal effect on the resolution of the petitions before the State Board.

¹⁶ Subdivision (b) of Public Resources Code section 21080 specifies several types of activities that are statutorily exempt from CEQA. In addition, the California Code of Regulations lists several categories of activities that the Resources Agency has determined do not have a significant effect on the environment and, therefore, are ordinarily exempt from CEQA. (Cal. Code Regs., tit. 14, §§ 15300 et seq.)

impacts and alternatives and mitigation measures by which those impacts can be avoided or minimized. (Pub. Resources Code, §§ 21002.1, 21061, and 21080(d).) If there is no substantial evidence, in light of the whole record before the lead agency, that a proposed project would have a significant effect on the environment, then the lead agency will adopt a negative declaration. (Pub. Resources Code, § 21080(c).) A negative declaration is also appropriate if an initial study of a project identifies potentially significant effects on the environment, but the project is revised to avoid or mitigate the adverse effects to a less-than-significant level before the initial study and negative declaration are released for public review. (Pub. Resources Code, § 21080(c).)

The primary responsibility for review and approval of timber harvesting proposals on nonfederal land lies with CDF and BOF pursuant to the Forest Practice Act. (Pub. Resources Code, § 4511 et seq.). The CDF/BOF process for review of timber harvesting plans has been certified as a functional equivalent of the EIR process under CEQA. (Cal. Code Regs., tit. 14, § 15251(a).) ~~Similarly, the primary responsibility for regulation of timber harvesting proposals on federal land lies with USFS.~~

The “project” at issue in this proceeding is not the timber harvesting proposed under each of the plans considered by CDF, ~~or the USFS.~~ Rather, the project is the Regional Board’s adoption of successive interim waivers of the requirement to obtain waste discharge requirements for specified categories of timber harvesting projects. In the absence of a waiver, Water Code section 13260 would require anyone who proposes to conduct timber harvesting that would result in the discharge of waste to file a report of waste discharge with the Regional Board. The Regional Board would then prescribe waste discharge requirements intended to protect the beneficial uses of water that could be affected and to implement any relevant water quality control plans. (Wat. Code, § 13263.)¹⁷ Under the waiver process established by the Regional Board, waste discharge requirements are not issued for most timber harvesting projects. Instead, parties proposing to undertake timber harvesting are required to file a Notice of Intent with the Regional Board in which they certify that they will comply with applicable water quality regulations and all provisions of the waiver.

¹⁷ In addition to waste discharge requirements for individual projects, Water Code section 13263(i) authorizes regional boards to issue general waste discharge requirements for a category of discharges where the discharges: (1) are from the same or similar operations; (2) involve the same or similar types of waste, (3) require the same or similar treatment standards; and (4) are more appropriately regulated under general requirements rather than individual requirements.

Order No. R1-2002-0109 includes a finding that “there will be no significant adverse environmental impacts, individually or cumulatively, from the waiver authorized herein provided that there is compliance with the provisions of this order.” (Order No. R1-2002-0109, p. 3, par. 22.)¹⁸ Strictly speaking, this finding may be technically correct, i.e., if everyone who conducted timber harvest operations pursuant to the waiver complied fully with the provisions of the basin water quality control plan as required by the waiver then the waiver of waste discharge requirements would have no significant adverse effect on environment. As a practical matter, however, the effect of adopting the waiver is to allow future timber operations to be undertaken with no specific conditions or other assurance that those projects will not cause further adverse effects on water quality. The fact that the Regional Board or its Executive Officer may determine that the waiver does not apply to certain projects does not change the fact that the waiver effectively allows projects to proceed without issuance of waste discharge requirements or any assurance of project-specific review and determinations by the Regional Board.

In contrast to the waivers adopted by the Central Valley Regional Water Quality Control Board and the Lahontan Regional Water Quality Control Board,¹⁹ the interim waivers adopted by the North Coast Regional Water Quality Control Board do not contain specific criteria to identify the types of timber harvest activities that are and are not allowed pursuant to the waiver. Rather, the North Coast waivers establish general mandates such as complying with requirements of the Basin Plan, complying with any monitoring that may be required by the Regional Board Executive Officer, and certifying that the discharger understands and intends to comply “with all water quality regulations including the provisions of this waiver.” In addition, the interim waivers for the North Coast region include conditions over which neither the discharger nor the Regional Board has any control. For example, the waivers for timber harvesting projects on nonfederal land are conditioned upon occurrence of the following events:

¹⁸ The Regional Board determined that the extension of the waiver adopted in Order No. R1-2003-0116 does not represent a substantial modification of the project approved in Order No. R1-2002-0109 and, therefore, did not prepare any additional environmental documentation for the extension of the waiver. Based on the previous Negative Declaration and other evidence, the Regional Board concluded that the one-year extension of the waiver would not have a significant impact on the environment. (Order No. R1-2003-0116, p. 4.)

¹⁹ In Order No. WQO 2004-0001 and Order No. WQO 2004-0002, the State Board approved waivers of waste discharge requirements for timber harvest activities issued for the Lahontan and Central Valley regions. The orders contain a detailed discussion of the conditions placed on waivers issued for those regions.

“The California Board of Forestry and the California Department of Forestry and Fire Protection proceed to adopt and implement: (a) a water quality regulatory program consistent with the Water Quality Control Plan for the North Coast Region (Basin Plan); (b) a timber harvest verification system, including but not limited to inspection, surveillance, monitoring, and enforcement, acceptable to the Regional Board; and (c) a regulatory process sufficient to maintain water quality control plan (“Basin Plan”) standards and [TMDL] prescriptions as from time to time adopted by the Regional Water Board and approved by the State Water Resources Control Board.” (See Order No. R1-2003-0116, p. 5.)

Including the above condition as a provision of a waiver raises a number of problems. First, the requirement for BOF and CDF to “proceed to adopt and implement” an extensive program implies that the desired program is not now in effect. If the requirements of the condition were met and the desired BOF/CDF program were currently in effect, then a waiver for most timber harvesting on nonfederal land might be appropriate because the specified program by definition would be “sufficient to maintain water quality standards” in the Basin Plan and any applicable TMDL prescriptions. Conversely, in the absence of more specific conditions defining when the waiver applies, adopting a waiver based on the occurrence of conditions that may or may not happen, and that are not under the control of the Regional Board or potential discharger, results in a situation in which projects conducted under the waiver may cause significant adverse effects on water quality.

Prior to adoption of the waivers at issue in this proceeding, most logging operations in the North Coast Region were conducted in reliance upon the previous waiver from waste discharge requirements as established by the Basin Plan and Regional Water Quality Control Board Resolution No. 87-113.²⁰ As with the current waiver, the waiver adopted in 1987 applied to projects conducted pursuant to timber harvest plans approved by CDF and required the discharger to comply with the Basin Plan. Similarly, the 1987 waiver did not include specific detailed criteria to ensure that there would not be any significant effects on water quality from projects carried out pursuant to the waiver.

The adverse effects on water quality from timber operations during the period that the Regional Board’s 1987 waiver was in effect are addressed at some length in recent orders of the State Board and Regional Board, in the administrative record submitted by the

²⁰ Basin Plan, p. 4-35.00.

Regional Board, and by the additional evidence presented in the State Board proceeding.²¹ The record establishes that timber harvesting conducted during the period of the 1987 waiver has had a significant adverse impact on water quality in some areas of the North Coast Region. Based on that record, it is reasonable to conclude that additional timber harvesting conducted under the authorization of the interim waivers adopted for 2003 and 2004 has the potential to cause further deterioration of water quality.²² In view of the substantial evidence of adverse impacts of timber harvesting on water quality in the North Coast Region during the period covered by the 1987 waiver, the Regional Board's finding that the waiver adopted in Order No. R1-2002-0109 could not have a significant effect on the environment is not supported by the record. Adoption of the waiver set forth in Order No. R1-2002-0109 established a process that could result in further significant adverse effects on the environment for which the Regional Board was required to prepare an EIR. (Pub. Resources Code, § 21080(d).)²³ Having not complied with CEQA in adopting a negative declaration for Order No. R1-2002-0109, the Regional Board may not rely upon that negative declaration as the required environmental documentation for extension of the waiver adopted in Order No. R1-2003-0116.

²¹ E.g. Based on evidence regarding the effects of timber harvesting on water quality, State Board Orders WQO-2002-0004 and WQO-2002-0019 directed the Regional Board to file periodic progress reports with the State Board regarding the actions it is taking to address water quality impacts related to timber harvesting. Among the Regional Board actions taken to address adverse impacts of timber operations on water quality are Cleanup and Abatement Order No. R1-2002-0085, which requires a timber operator to submit a workplan for corrective actions to reduce sediment discharge in the Elk River watershed. Regional Board Cleanup and Abatement Order No. 98-100 also addresses adverse impacts to beneficial uses of water from timber harvesting and related activities during the period that the prior waiver was in effect. A detailed description and evaluation of the relationship between increased production of sediment due to timber harvesting and adverse effects on beneficial uses of water in five watersheds in the North Coast Region is provided in the December 27, 2002, report of the Humboldt Watersheds Independent Scientific Review Panel that was prepared under the auspices of the North Coast Regional Water Quality Control Board. (EPIC Exhibit F.) Further expert analysis of the relationship between sediment generated by timber harvesting and impairment of beneficial uses of water is provided in the subsequent report by the same group that is included as part of the Regional Board's administrative record for its adoption of Order No. R1-2003-0116. ("Phase II Report: Independent Scientific Review Panel on Sediment Impairment and Effects on Beneficial Uses of the Elk River and Stitz, Bear, Jordan and Freshwater Creeks," August 12, 2003.)

²² The baseline for determining potential effects on the environment is the environment or the existing physical conditions present at the time that analysis of potential environmental effects is undertaken. (See Cal. Code Regs., tit. 14, §§ 15125 and 15126.2; State Board Order WR 2001-07, p. 3.)

²³ Although an EIR was required to be prepared prior to adoption of the waivers addressed in this order, a negative declaration would be sufficient in other situations where there is no substantial evidence that the waiver in question would have a significant adverse effect on the environment.

C. Public Interest Considerations

Contention: Petitioners contend that the waivers adopted by the Regional Board are contrary to the public interest and, therefore, in violation of Water Code section 13269. Petitioners argue that the waivers do not provide adequate protection of water quality and that issuance of a waiver without requiring payment of fees results in subsidizing logging operations. Petitioners also contend that the waivers reduce the opportunity for public participation.

Findings: As discussed above, a waiver of waste discharge requirements that is based upon the assumption that CDF and BOF will establish an improved water quality regulatory program provides no assurance of adequate water quality protection. The record contains substantial evidence of significant water quality problems related to timber harvesting under the 1987 waiver. In the absence of more specific conditions to protect water quality, we conclude that the provisions of the waivers adopted for 2003 and 2004 that apply to timber harvesting on nonfederal land are insufficient to provide a reasonable assurance of water quality protection and are not in the public interest as required by Water Code section 13269.

At the time the Regional Board adopted the interim waivers for 2003 and 2004, it was not authorized to charge fees to cover the Regional Board's expenses in administering the waivers. The recent amendment of Water Code section 13269 by Senate Bill 923, which went into effect January 1, 2004, authorizes assessment of fees on dischargers subject to waivers. Therefore, the adoption of a waiver is not a deterrent to imposing fees. We are cognizant that the State Board has not included waivers in our fee schedule. Even if a waiver fee were imposed, in light of the current state spending restrictions, the Regional Board would not at this time be able to hire additional staff to conduct the program. The State Board may consider the issue of imposing fees for dischargers subject to waivers in a separate rulemaking proceeding. In any event, however, the fact that the Regional Board chose to issue a waiver in lieu of waste discharge requirements does not prevent the funding of the regulatory program through fees.

Finally, with respect to the issue of public participation, Water Code section 13269(f) requires a public hearing prior to adoption of a waiver. The record shows that the Regional Board held public hearings prior to adoption of the interim waiver in 2002 and prior to renewal of the waiver for another year in 2003. Compliance with section 13269 ensures that adoption of any revised waiver must also be preceded by an opportunity for public review and comment on the proposed waiver. Thus, the statutory process for adoption of waivers provides

adequate opportunity for public participation and, with the exception of CEQA compliance issues addressed above, the required process was followed in this instance.²⁴

IV. CONCLUSION

Based on the findings above, the State Board concludes that the Regional Board's adoption of the Negative Declaration for the interim categorical waiver adopted in Order No. R1-2002-0109 was contrary to the evidence in the record and in violation of CEQA. In addition, the conditions of the waiver are expressed in very general terms and the waiver lacks specific criteria to ensure compliance with requirements of the Basin Plan. The provision of the waiver requiring that CDF and BOF adopt and implement a water quality regulatory program and a timber harvest verification system makes the waiver for timber harvesting on nonfederal land conditional upon future actions that are not under control of the Regional Board or potential dischargers, and which are not subject to verification in any apparent or specified manner. The interim categorical waiver adopted by the Regional Board in Order No. R1-2002-0109 for discharges related to timber operations in the North Coast Region does not comply with the requirements of Water Code section 13269. In view of the fact that the waiver adopted by that order expired on December 31, 2003, no further action is necessary with respect to Order No. R1-2002-0109.

The Regional Board treated the interim waiver adopted by Order No. R1-2003-0116 for calendar year 2004 as a modification of the waiver that applied to the previous year and did not prepare any additional environmental documentation for the interim waiver that is currently in effect.²⁵ Although the interim waiver adopted in Order No. R1-2003-0116 contains additional conditions not included in the interim waiver for the previous year, those conditions do not address the fundamental problems of non-compliance with CEQA and non-compliance with the public interest requirements of Water Code section 13269 discussed in this order.

²⁴ In addition, the public has a separate right to comment on individual timber harvesting plans pursuant to the review process under the Forest Practice Act.

²⁵ This order directs the Regional Board to prepare appropriate CEQA documentation for future actions taken in response to this order. At the March 18, 2004, State Board meeting, counsel for Petitioners indicated that Petitioners presume the Regional Board will prepare new CEQA documents for the future actions it proposes to undertake in May 2004 regarding regulation of discharges related to timber harvesting. Counsel further indicated that his clients would not be trying to "stop logging" in the interim based on the argument that the CEQA documentation for the present interim waiver was inadequate. The State Board acknowledges that discharges due to logging may continue during this interim period pending revocation of the interim waiver currently in effect.

Therefore, this order remands Order No. R1-2003-0116 to the Regional Board for reconsideration and further action consistent with the findings and provisions herein.²⁶

V. ORDER

IT IS HEREBY ORDERED that:

1. Order No. R1-2003-0116 is remanded to the Regional Board for reconsideration and further action within 30 days of the date of this order. If the Regional Board has not acted within 30 days of the date of this order, the provisions of Order No. R1-2003-0116 that remain in effect ~~is~~are vacated as of that date.²⁷

2. The Regional Board shall comply with applicable environmental documentation requirements of the California Environmental Quality Act for the adoption of any waiver or waste discharge requirements that the Regional Board adopts to replace the interim waiver established in Order No. R1-2003-0116. The Regional Board shall not rely upon the negative declaration that was adopted for Order No. R1-2002-0109 to satisfy environmental documentation requirements for future waivers or waste discharge requirements.

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²⁶ The new authority provided to the Regional Board under Public Resources Code section 5482.71, effective January 1, 2004, will serve as an additional means of protecting water quality from potential adverse impacts of timber harvesting pending further Regional Board action with respect to categorical waivers for timber harvesting.

²⁷ As discussed previously, Regional Board Order No. R1-2004-0015 has already vacated the provisions of Order No. R1-2003-0116 that apply to timber harvesting activities on federal land managed by the USFS.

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~~April 6, 2004~~ May 7, 2004

3. Any future actions by the Regional Board to adopt a categorical waiver for discharges related to timber harvesting shall be consistent with the findings and conclusions of this order.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on ~~April 22~~ May 20, 2004.

AYE:

NO:

ABSENT:

ABSTAIN:

DRAFT

Debbie Irvin
Clerk to the Board